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ABSTRACT

This paper describes standards for procedures and structures that will enable students at the secondary and postsecondary levels to exercise their rights and fulfill their responsibilities in the educational institution. The paper has three main sections: 1) "The Institution's Relation to the Student," which includes the right of access to education, the right to affect organized learning activities, and the right to confidentiality of information; 2) "Student Affairs," which includes the right to freedom of association, the right to participate in institutional government, and the right to freedom of inquiry and expression; and 3) "Law, Discipline, and Grievance," which includes the right to establish standards for discipline and grievance, and the right to just enforcement of standards. Extensive footnotes cite legal backing and court decisions related to the various rights and responsibilities. (MBM)

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CODE OF STUDENT RIGHTS AND RESPONSIBILITIES

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Developed by the
NEA Task Force on Student Involvement

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NATIONAL EDUCATION ASSOCIATION RESOLUTION 69-12:

STUDENT INVOLVEMENT

(Passed by the NEA Representative Assembly, July 1969)

The National Education Association believes that genuine student involvement requires responsible student action which is possible if students are guaranteed certain basic rights, among which are the following: the right to free inquiry and expression; the right to due process; the right to freedom of association; the right of freedom of peaceful assembly and petition; the right to participate in the governance of the school, college, and university; the right to freedom from discrimination; and the right to equal educational opportunity.

The Association directs its officers and staff to establish a task force to--

a. Study further the rights and responsibilities of students and the causes of student unrest;

b. Develop a definitive statement on student rights and responsibilities;

c. Design action programs to ensure that the basic rights of students are not jeopardized.

PREFACE

Establishment of Task Force. This document results from actions mandated by the Representative Assembly of the National Education Association at its July 1969 meeting. Resolution 69-12 of that Assembly directed that the officers and staff of the Association "establish a task force to study further the rights and responsibilities of students and the causes of student unrest; develop a definitive statement on student rights and responsibilities; and design action programs to ensure that the basic rights of students are not jeopardized." Accordingly, a task force was named. Its members held a variety of positions in the schools as both educators and students: Dr. George Gumeson, community college professor, chairman; Mr. Taylor Brelsford, high school student; Mrs. Marilyn Godfrey, elementary teacher; Mr. Charles Gonzales, college student; Mr. William Barney Heath, high school student; Mr. James Melton, college student; Mr. Norman Najimy, secondary teacher; Miss Janet Portolan, college student; and Dr. Charles Wade, associate academic dean. NEA staff assisting the Task Force were Dr. Bernard McKenna, associate secretary, National Commission on Teacher Education and Professional Standards, and Mrs. Jane Power, staff writer, Publications Division.

Work of the Task Force. The group, designated the Task Force on Student Involvement, met repeatedly in early 1970. A total of 18 days were spent in interviews, visits to institutions, and drafting sessions. The Task Force visited New York, Washington, Denver, Atlanta, Boston, and New Orleans, gathering different kinds of information and different points of view. Task Force members have also familiarized themselves with schools at different levels in California, Colorado, Denver, Iowa, Massachusetts, New Jersey, New Mexico, and Texas. The Task Force has talked to high school and college-level students, teachers and administrative personnel; educational researchers; staff members of affiliated associations; authorities on student viewpoints and actions; and legal counsel. They met in classrooms, offices, homes, lounges, and cafeterias, meeting people where they are. Between meetings, Task Force members studied extensively documents on student rights, legislation

and legal decisions affecting student rights, and a variety of articles on general and specific aspects of current student movements.

Educational levels dealt with. The working paper on student rights and responsibilities that follows is one of the results of these activities. It addresses itself to the second part of the charge to the Task Force from the Representative Assembly. The body of the paper deals with applications of rights and responsibilities of students at the secondary and postsecondary levels.[1] Distinctions between the two levels are drawn where differences in probable maturity or in legal responsibility make them necessary. Some of the basic rights of students in elementary school are set forth in the introduction. The ways these students should be able to exercise these rights are not described in detail, however, because the elementary school contains students at such widely differing stages of development.

Aim of recommendation. The working paper describes standards for procedures and structures that will enable students to exercise their rights and fulfill their responsibilities in the educational institution. Such exercise and fulfillment are not now guaranteed, but they are necessary if students are to develop their intellects and characters to the fullest. The Task Force recognizes that the nature of present systems of governance and legislation makes it improbable that most institutions will meet all the proposed standards in the near future. The members feel, however, that if the statement is to be "definitive," as mandated, it cannot be tailored to present school conditions, which are changing

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[1] "The high school student perhaps even more than the university student needs careful adherence to concepts of procedural fairness and reasonableness by school officials. [citation omitted.] As minors they occupy a different status under the law and often are too inexperienced or immature to know how to protect themselves against charges of misconduct." Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1343 (S.D. Tex., 1969).

with extreme rapidity. They consider, furthermore, that an NEA statement on a topic so central to the interest of teachers should not be liable to obsolescence within a few years. Consequently, this paper sets forth conditions that are as nearly ideal as the Task Force can imagine at present, rather than those that can be soon or easily attained.

INTRODUCTION

A revolution in rights has begun throughout our society during the last decade. Those who claim rights are being required to recognize the rights of others. A man's right to control other men is being challenged; a man's right to make his own decisions and act on them is being recognized and exercised. The shift from external to internal control is dirficult, because for every new right a person gains over himself, somebody else has to yield up the authority to tell him what he must or must not do. Out of the struggle a more balanced concept of rights is emerging; the line where one man's rights end and another's begin is being drawn more nearly half-way between them instead of far to one side.

The newly won rights imply corresponding responsibilities. A person is responsible for the way he exercises his rights: he must accept the consequences of his actions imposed by the operation of natural or man-made law. He is also responsible for accepting the boundaries of his rights, because each exercise of an individual's rights must demonstrate respect for the rights of others.

Public education has long been the right of every American. Frequently, however, unfavorable circumstances have been allowed to prevent some citizens from obtaining an education that is meaningful to them. Now, the revolution in rights and responsibilities is affecting the educational institution and both the content and the process of education. Teachers are securing recognition of their right to exercise their best judgment about the practice of their profession. They are also realizing that freedom to learn and freedom to teach cannot exist independent of one another. Secondary and postsecondary students are pointing out that they are actively engaged in the practice of living and that therefore they have the right to assume

responsibilities other people bear. The idea that the student's right is the right to choose for himself only those things adults would choose for him is being rejected as a basis of relationships between adults and young people. It has become evident that young people have contributions to make to the society and the schools --in viewpoints, in ways of dealing with problems, inideas --that adults cannot make and may not willingly accept, but that are valuable nevertheless. Furthermore, as Margaret Mead has pointed out,* the young people of today have had experiences that no adult has had at the same age, so they have a unique perspective. If their ideas and experiences are to benefit rather than divide our society, students must exercise the right to make choices that will make a difference, not just "pretend" decisions.

A person must grow into responsibility for the actions he chooses through examination of other people's experiences, followed by his own experiences, evaluation of the consequences, and adjustment of assumptions. Children need to begin early to practice self-determination if they are to become responsible citizens of a democratic society. "Whatever may be their precise impact," the Supreme Court said in the Gault decision,** "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." The exercise of rights changes as students mature; the rights do not change. Although the code that follows sets forth the exercise of rights at the secondary level and above, the rights themselves pertain to students at the elementary level also. Elementary school staff members must recognize the rights that belong absolutely to human beings, whatever their age, just as surely as educators who work with older students must.

The rights of students are of two kinds. As citizens, they have a right to fair treatment, in the school as in the society. The educational institution

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* Mead, Margaret. Culture and Commitment: A Study of the Generation Gap. Garden City, New York: Natural History Press, Doubleday and Co., 1970. pp. 62-64.

** In re Gault, 387 U. S. 1,13 (1967)

must not discriminate against them because of their age, their race, or any other reason, but must grant them the same legal rights accorded other citizens. The schools must act toward every student with equal respect and without prejudice, regardless of his identity, resources, or affiliations, in every matter from admissions to disciplinary procedures. The educational institution must grant students the rights guaranteed by the Bill of Rights and legal precedent. For example, students of all ages have a right, in disciplinary cases, to be presumed innocent until found guilty and to benefit from the use of fair procedures for determining facts and imposing penalties. Procedures will vary according to the nature of possible disciplinary actions, from discipline administered by the teacher in the learning situation to expulsion. How the presumption of innocence is protected and what procedures are fair may not be the same in secondary school and college as in elementary school, but the rights remain the same. Some of the other rights all students derive from their status as citizens are the right to privacy; the right to form groups to pursue their interests; and the right to express themselves, through such activities as planning and presenting programs or reproducing and distributing their writings and other communications.[1]

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[1]These rights and -- until now to a lesser extent -- rights of students as clients of the schools are being confirmed by a growing number of court decisions, which are cited at appropriate parts in the body of the Code. Courts seem generally to accept jurisdiction over cases involving educational institutions' relations with their students when these relations involve infringement of students' constitutional rights as citizens or of the public welfare (although questions regarding the statutory authority of public institutions also may be raised). In 1943, the Supreme Court held in the case of West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640 "We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." Because of the severe implications of expulsion for example the Fifth Circuit in the case of Soglin v. Kaufman, 418 F.2d 163, 167 (1969), refused to distinguish between university regulations and criminal law in this connection, subjecting both to the same restrictions: "Administrative sanctions as harsh as those available to the University in this case, as well as criminal statutes, serve to chill the exercise of free speech. It is accordingly immaterial that this controversy involves a disciplinary rule rather than a criminal statute." That students may have behaved badly according to some standard does not prevent the federal courts from securing to them their constitutional rights: "Plaintiffs' [students]

Other rights of students derive from their status as clients of an institution. Like other clients, they have the right to influence the effects the institution has on them. As other institutions exist to serve their clients, schools at all levels exist so that people attending them can learn. More than most institutions, schools influence the course of their clients' present and future lives. Students therefore have the right to substantial influence over the educational program, including the goals they pursue, the topics they study, the learning materials and learning processes they use, and the criteria for evaluating accomplishment.

The educational institution performs a necessary function in the society. It is in the school that young people learn and practice citizenship and humanity

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conduct is not determinative of jurisdiction. The proper question here is whether defendents [institution] were depriving plaintiffs of any constitutional rights regardless of the character of their behavior." id. at 166.

"Courts do not and cannot intervene in resolution of conflicts which arise in daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' Shelton v. Tucker, 364 U.S. 479, 487 [parallel citations omitted] (1960)." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). This line of thinking was pursued in Breen v. Kahl, 419 F.2d 1034, 1037 (1969): "To uphold arbitrary school rules which 'sharply implicate basic constitutional values' for the sake of some nebulous concept of school discipline is contrary to the principle that we are a government of laws which are passed pursuant to the United States Constitution." The decision continues, at 1038; "To fail to hold such arbitrary regulations unconstitutional because of fear of opening the floodgates to litigation, some meritorious and some not, would be an abdication of the judiciary's role as final arbiter of the validity of all laws, and protector of the people, young and old, from the governmental exercise of unconstitutional power." The decision in Dickey v. Alabama State Board of Education, 273 F. Supp. 613, 619 (5th Circ. 1966) points out that the argument that discipline will suffer is superficial beside possible damage to students' education if the institution sets an example of ignoring Constitutional principles.

Recourse to the courts is natural for those who have no other way to obtain justice. In NAACP v. Button, 371 U.S. 415, 429-30, the Supreme Court recognized that "Groups which find themselves unable to achieve their objectives through the ballow frequently turn to the courts....under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."

They may learn what society says they must learn; or their lesson may be quite different. The school experience may give them practice in being independent citizens and creative individuals -- or in being easily led, of little responsibilty, and mindless. If students are to be the kind of people our society requires, the educational institution must respect the student's rights,and encourage him to exercise them. The community, for its part, must not require the schools to restrain students from any given action merely because it is locally or nationally unpopular. Educators must be free to practice their profession, not act as censors of student attitudes and expressions. Students must be free to practice living through school experiences.

I. THE INSTITUTION'S RELATION TO THE STUDENT

A. The Right of Access to Education

1. Equality of access and status. No educational institution at any level may[1] deny admission, or access to any program or facility, to an applicant solely because of his race, age, marital status, national origin, physical handicaps, previous criminal record, or previous political activity. No educational institution may use criteria which result in unequal treatment of applicants because of socioeconomic background. Nor may any institution receiving public funds[2] allow tuition charges to prevent admission of any applicant. Private institutions purporting to be coeducational and all institutions receiving public funds must not take account of an applicant's sex in considering admission, or access to any program.

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[1]Throughout this code, "must" in the affirmative and "must" or "may" in the negative express absolute necessity. "Should" expresses recommendation, and "may" in the affirmative expresses permissibility.

[2]Use of public funds is the criterion for a public institution applied throughout this code. In regard to due process, for example, a Massachusetts court has said, "The requirements of due process with reference to procedural safeguards..., which have generally been applied only to public universities, socalled, should be applied in this case, particularly with reference to requiring [the institution] to exercise basic fairness and justice toward the plaintiff. Although some courts have limited this requirement, as noted, to public or state operated universities, and the like, the principle has been extended to quasi-public universities, in some jurisdictions. Examination of these authorities has led me to the conclusion that, in the type of case involved in this litigation, continued nonapplication of the principle of due process has little, if any, validity." Sturm v. Trustees of Boston University, Equity No. 89433 5.13 (Sup. Ct., Suffolk County, 1969) The same court held that "Education is no longer a luxury for the few, but is a necessity for all the young people of America. The old notion dealing with socalled private colleges, has disappeared in great part. And now many such institutions are described as quasi-public, because of their use as well need of public funds in one form or another, in order that they survive. The importance of their continuance is such that they cannot be permitted to go out of existence."

No institution should attempt to discourage or prevent its students from continuing attendance and study, unless it expels or suspends them for cause, after a hearing consistent with due process.[1]

No institution may require a student to pay a fee he cannot afford in order to participate in the normal activities of the institution, nor may any institution using a traditional grading pattern require a minimum grade-point average for nonacademic honors or activities.

The Sixth Circuit also has based the public responsibilities of private institutions, in this instance a hospital, on both use of public funds and public function served: "[An] institution such as this, serving an important function and financed by public funds, is sufficiently linked to the state for its acts to be subject to the limitations of the Fourteenth Amendment." Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33, 35 (1968). This decision was cited in the case of Brown v. Strickler, 422 F.2d 1000, in the same circuit, which applied the principle directly to private learning institutions which receive some public funds. The principle had already been well established in the case of hospitals.

[1]A legal right to an education can be inferred from its necessity for an individual's economic and social viability. As early as 1923, the Supreme Court held, Meyer v. Nebraska, 262 U.S. 390, 399--a case involving academic freedom--that "without doubt, [liberty] denotes not only freedom from bodily restraint, but also the right of the individual...to engage in any of the common occupations of life, to acquire useful knowledge,...and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." In its 1954 decision in the case of Brown v. Board of Education of Topeka, 74 S. Ct. 686, 691, the Court expanded on the necessity of education for the exercise of such liberty: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Accord, Dixon v. Alabama State Board of Education, 294 F.2d 150, 157 (1961).

The Court went on to touch on what has been one of the most discussed aspects of public benefits, the distinction between rights and privileges: "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The necessity of education for the exercise of liberty argues for its treatment as a right; even when it is considered a privilege, in the sense that the state need not undertake

2. Public elementary and secondary education. Education of high quality in the public schools must be accessible to all people alike. Legal and institutional regulations must be written and interpreted in such a way as to increase, not limit, such accessibility. Public elementary and secondary schools receiving federal funds may not exclude out-of-district or out-of-state students, nor may they charge the student tuition--although they may charge his home school district. Nor may a district require

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to provide it, however, any state that does provide it must make it available to all without invidious discrimination. Since all states have in fact undertaken to provide a public educational system, education must be considered a right in that it may not be arbitrarily denied to anyone. This point was made by the court in Smith v. Reynolds, 277 F. Supp. 65, 67 (1967), which did not consider education a "constitutional right": "It is elementary constitutional doctrine that the Equal Protection Clause of the Fourteenth Amendment prohibits a State or instrumentalities of the State from invidious discrimination among its citizenry. Reitman v. Mulkey, 387 U.S. 369 [parallel citations omitted]. There is, of course, no constitutional right to receive public welfare any more than there is a constitutional right to public education or even public police protection. However, if the State chooses to provide such public benefits, privileges, and prerogatives, it cannot arbitrarily exclude a segment of the resident population from their enjoyment." Accord, Sherbert v. Verner, 374 U.S. 398, 404 (1963) (unemployment compensation); Robertson v. Ott, 284 F. Supp. 735 (D. Mass. 1968) (welfare payments); Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (government contract).

In regard to public employment, the Supreme Court said in the case of Wieman v. Updegraff, 344 U.S. 183, 192 (1952): "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." In the case of a teacher in a public college, Slochower v. Board of Higher Education of City of New York, 350 U.S. 551, 555, the same Court further defined the limits of infringement even when a "right" is not involved: "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities." Similarly, in Keyishian v. Board of Regents, 345 F.2d 236, 239 (1965): "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."

a student to pay tuition because he resides in the district and his parents or legal guardians do not. As long as a local district receives outside funds, it must not reserve its benefits to local citizens only.

In Lawson v. Housing Authority, 270 Wisc. 269, 275, 70 N.W. 2d 605, 608 (1955), the decision explicitly assailed the use of the right-privilege distinction: "If a precedent should be established that any governmental agency whose regulation is attacked by court action can successfully defend such an action on the ground that plaintiff is being deprived thereby only of a privilege, and not a vested right, there is extreme danger that the liberties of any minority group in our population, large or small, might be swept away without the power of the courts to afford any protection."

The ruling in Knight v. State Board of Education, 200 F. Supp. 174, 178 (1961) explicitly disregarded the right-privilege distinction in view of the extreme interest the individual has in his education, outweighing all but the most exigent state interest to the contrary: "The defendants' [state board's] argument that the interest which the plaintiffs have in attending a state university is a mere privilege and not a constitutional right was specifically rejected in the Dixon case [294 F.2d 150 (1961)], and the Court thinks rightfully so. Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value, especially to those students who have already enrolled in the institution and begun the pursuit of their college training. Private interests are to be evaluated under the due process clause of the Fourteenth Amendment, not in terms of labels or fictions, but in terms of their true significance and worth." Furthermore, the government may not interfere arbitrarily even with actions that are neither rights nor specific privileges: "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." Homer v. Richmond, 292 F.2d 719, 722 (D.C. Cir. 1961).

Distinctions between those who are admitted and retained in schools receiving public funds (presumably all schools are serving a public purpose, education of citizens) and in their various programs and those who are excluded or expelled must clearly not only be "reasonable, lawful, and nondiscriminatory," but be based on public interest greater than the individual's interest in obtaining an education. "[C]lassification in State statutes which purport to exclude from coverage one or more classes of individuals who would otherwise qualify for the advantages and opportunities conferred by the Legislature must be examined in order to determine whether there is any legitimate purpose for the distinction; whether an important and constitutionally cognizable State interest inheres in the classification, or whether on the other hand, the exclusion is purely arbitrary. Loving v. Commonwealth of Virginia, 388 U.S. 1 [parallel citations omitted](1967); Carrington v. Rash,

The right to an education and to participation in all the activities of the school must not be abrogated or restricted for a particular student

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380 U.S. 89, 93 [parallel citations omitted] (1965). If the distinction is arbitrary, then the statute deprives the citizens so excluded of equal protection of the State's laws and of the benefits which those laws may impart. A discrimination without rational basis and without legitimate purpose or function is inherently invidious, and hence constitutionally interdicted....There must be some otherwise legitimate purpose for excluding members of the class who are in fact deprived of the protection and privileges of existing laws....If the classification is without purpose, it is arbitrary per se and offends the Equal Protection Clause." Smith v. Reynolds, 277 F. Supp. 65, 67, 68.

Classification within the institution is equally subject to judicial scrutiny: "[C]an the College require girls under 21 to live on campus while allowing others to live off campus simply to meet expenses?....This is the type of irrational discrimination impermissible under the Fourteenth Amendment." Mollere v. Southeastern Louisiana College, 304 F. Supp. 826, 827 (1969).

The effect of all this litigation is nicely summed up in the Seventh Circuit decision in the case of Crews v. Cloncs, (No. 18110, 4-5 April 1970). "It is now clearly established that the state does not possess an absolute right arbitrarily to refuse opportunities such as education in public schools or employment in public service [citations]....In order to protect these rights from arbitrary infringement, courts must judge the constitutionality of disciplinary action which denies a student the opportunity to attend classes or to obtain equal opportunity to education. In making this judgment we must weigh and consider competing individual rights and the state's claim to an orderly and efficient educational system."

Another approach to the relationship between a student and an institution charging tuition is contractual: "There is an implied contract between the plaintiff and [the institution] whereby the plaintiff agreed to pay his tuition, and other charges, and agreed to abide by whatever reasonable rules, regulations and standards are promulgated with reference to all students, and whereby [the institution] agreed to make available the educational process to the plaintiff and that these opportunities would not be denied the plaintiff arbitrarily or in violation of standards of basic fairness and justice." --Sturm v. Trustees of Boston University, Equity No. 89433 (Sup Ct., Suffolk County, 1969).

solely because of marriage, pregnancy, or parenthood.[1]

3. Postsecondary undergraduate education. It is a basic principle of American democracy that all citizens have the right to pursue a course of life suited to their talents and desires. In order to select and pursue such a course of life, each citizen needs an education which permits and encourages him to realize his potential. To provide such an education or the basis for further education is the function of the public elementary and secondary schools. Every student, however, does not at present have access to this kind of education. To assure young people their right to choose a suitable course of life, educational institutions beyond the secondary level must not risk excluding applicants whose previous education has not developed their abilities as fully as possible. Postsecondary undergraduate institutions--whether colleges, vocational schools, or of any other kinds--must therefore admit all applicants.

Initiation of an open admissions policy in itself, however, makes little progress towards equality of educational opportunity. An institution with open or expanded admissions is obligated to provide means whereby those

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[1]A rule requiring a student to withdraw from public school because of marriage was found to be unreasonable in the case of Bently v. Bd. of Ed. of Harrodsburg, 383 S.W. 2d 677 (Ky. 1964). Rules excluding married students from extra-curricular activity have been slower to be rejected, but in view of the fact that such activities generally receive some support from public funds and are a valuable part of the educational experience, they may be shown to be unconstitutional. In April 1970 a federal district court in New Jersey ordered (Johnson v. Board of Education of the Borough of Paulsboro, C.A. No. 172-70) that the school board and its agents cease to "discriminat/e/ against students as to participation in extra-curricular activities solely on the basis of said students' marital and/or parental status."

with non-standard preparation may be enabled to benefit from higher education to the extent of their ability.

4. Advanced or graduate programs. Any admission requirements an advanced or graduate program may have must be established by representatives selected by and from the student body, faculty, administration, and the community.* All criteria of ability or achievement used as standards of admission must be so designed as to be independent of the applicant's cultural or socioeconomic background. An institution most of whose funding comes from local sources may give admission preference to local residents; if most of its funding comes from local or state sources, an institution may give preference to state residents. Any institution receiving any federal aid must, however, reserve some places for applicants from outside the state or locality.

An advanced or graduate program with admission requirements must admit impartially all applicants who meet those requirements. New resources should be added to the traditional ones to the extent necessary to accomodate the qualified applicants.

5. Notice concerning institutional character. Institutions with doctrinal commitments may give admission preference to students of their own persuasion if they clearly and publicly state such preference. All institutions should inform prospective students in writing of their substantive and procedural regulations, their educational philosophy, and

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*The local community should be represented on all boards made up of more than one segment of the school community, such as faculty-student panels, in schools that receive public funds. Local community representation will be mentioned specificially only when it is recommended for all institutions, including those that do not receive public funds.

the role of their students, so that applicants can make informed choice among schools.

B. The Right To Affect Organized Learning Activities

1. The instructional program. The institution must provide an educational program that is adequate by the standards of students, teachers, the community, and the administration. As a structure to ensure such adequacy, a committee should be established, made up of representatives selected in equal numbers by and from the first three groups and including administrative representation. This committee should determine and periodically re-evaluate the philosophy of the institution and the behavioral objectives of the educational process in the institution. The range of programs selected to achieve these objectives should be limited only by the availability of teachers, facilities, and funds. The interests of those who disagree with the committee's decisions should be protected by provision for petition on the inception or continuation of any learning activity. Such petition should take effect when signed by a specified and reasonable number of students.

A student may wish to study a topic for which assembling a group of students is either impossible or undesirable. He must be able to set up a program of independent study of this topic, with whatever assistance from the staff he and the staff members involved consider necessary. Students should have access to learning experiences outside the school or operated by nonschool groups, such as freedom schools or free universities.

Each individual or group studying a particular topic must determine, jointly with the teacher, the purposes and content of the learning activity, means of attaining the goals in behavioral terms, and means of evaluating individual progress. In selecting means of evaluation, students and teachers

should bear in mind the arbitrary nature of curve grading and the doubtful validity of multiple-point grading and should give consideration to pass-fail and other broader evaluation plans. Students must be individually responsible for attempting to reach the stated goals.

In any institution where a Reserve Officer Training Corps program exists, student enrollment must be on a voluntary basis. Academic credit must not be granted for ROTC programs unless they meet the standards established for the other programs in the institution.

ROTC instructors must not hold academic rank unless they are members of an academic department subject to the same procedures of appointment and removal as other faculty. All ROTC programs should fully observe the institution's policies regarding the maintenance of records which relate or refer to social, religious, or political views or associations of the student.

2. Freedom of inquiry.[1] A student or students must be free to give attention to any topic that he or they and the teacher agree leads toward the

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[1]Ample judicial support for freedom of academic inquiry is provided by the Supreme Court's decision in the case of Sweezy v. New Hampshire, 354 U.S. 234, 250, which concerned a teacher: "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." It is interesting that this decision, rendered as early as 1957, pointed out the significance of the social sciences, one of the fields in which students now vehemently demand opportunities for useful learning experiences. In a concurring opinion Justice Frankfurter, joined by Justice Harlan, articulated even more strongly the necessity for free inquiry in this area (at 261-62): "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called

objectives of the designated learning activities. Discussion and expression of all views relevant to these objectives should be permitted in the classroom short of the point where they prevent the learning activity from continuing. Students must not be penalized for, or intimidated into, expressing or withholding personal opinions.

Standards for selection of materials must be cooperatively developed by students and teachers. These criteria must not restrict materials available

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the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities....For society's good--if understanding be an essential need of society--inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

"These pages need not be burdened with proof, based on the testimony of a cloud of impressive witnesses, of the dependence of a free society on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor."

Ten years later, the Court restated the principle in Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967): "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.... The classroom is pecularly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' United States v. Associated Press, D. C., 52 F. Supp. 362, 372."

That students may hold their own opinions in matters of opinion was touched on by the decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641--(1943) 42: "We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

to students because of any opinions expressed in them. Any student request for purchase of any instructional or resource material should be honored within the limitations of the established criteria and available funds.

3. Protection against improper evaluation. Students must be protected against prejudiced or capricious evaluation. This protection should be supplied by a grievance procedure including provision for appeal. Such procedure should be drafted by representatives selected by and from the student body and faculty.[1]

C. The Right to Confidentiality of Information*

Basic rights regarding information about students, like other kinds of rights, pertain to elementary as well as to secondary and postsecondary students. Elementary students have the same right as others, for example, not to be labelled for life by their records at any stage of their development. As in the rest of the Code, however, the applications of rights enumerated are those appropriate to secondary and postsecondary students.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

[1]See section IIIA1 for establishment of grievance procedure.

*Some central ideas and some specific recommendations in this section have been adapted from the Guidelines for the Collection, Maintenance, and Dissemination of Pupil Records, published by the Russell Sage Foundation. That document deals with records on the elementary and secondary levels; its concepts have therefore been broadly reinterpreted to deal with the focus of this document on secondary and postsecondary institutions and to reflect special concerns of the Task Force.

Records are kept to assist the school in offering appropriate educational experiences to the student. The interest of the student must supersede all other purposes to which records might be put. While the student is in junior high school, his parent takes equal part in this responsibility; afterwards, he bears it alone. This means that while a student is in junior high school, authorization for those actions listed below as requiring permission from the individual must be obtained from both the parent and the student. Copies of materials provided in accordance with the regulations below must be sent to both the student and the parent. After a student enters senior high school, he is the only person whose permission should be sought, and who should be kept informed regarding his record.

1. Classification of recorded data.* Some kinds of data concerning students should be kept permanently. These include the name and address of the parent or guardian, birthdate, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, and health data.

Other verified information may be recorded, but must be reviewed at specified intervals. Such information concerns performance on standardized intelligence and aptitude tests, some personality tests, interest inventories, the family, extracurricular activities, evaluations by staff members, and serious or recurrent behavior patterns.

2. Collection of Data. No data may be collected without the consent of the student. Consent is not valid unless the student understands the uses and implications of the material being collected.

Within the public school district, permission for collection of the more factual and objective kinds of data may be given by the school board, acting as a representative of the community. Students in other kinds of

*Any use of computerized data banks should be in accordance with the spirit of the following sections, even though the applications will necessarily differ in detail.

institutions may wish to designate a body to perform this function. All students must be notified what data collections are approved by this body.

No other data may be collected without the prior written consent of the student. This is necessary even when such data are being collected for purposes of research and the student's identity is not disclosed.

Only upon a student's specific written request is any entry to be made regarding his political or social views; his membership in any organization other than honorary or professional organizations directly related to the educational process; or his religion (unless the institution is church related). Such material, once entered, must be removed upon the student's specific written request. No police action against the student may be recorded.

On entering into a situation such as an interview with a student in which he may informally gather highly personal data, a professional staff member must stress to the student that he need not participate in the situation nor make any disclosure unless he chooses to do so. No step may be taken to compel a student to participate in such a situation unless an existing danger to persons or to the continuation of learning activities demonstrably outweighs the privacy interest involved.

3. Maintenance and security of recorded data. Except for the kinds of data designated above as permanent (see IC1), all information should be screened for continued validity and importance when the student passes from junior high to high school. All but permanent data should be destroyed when the student graduates from the institution--whether it be high school, junior college, or college--except that, provided all identification is removed, it may be kept for purposes of research.

The student must be kept informed of the content of his file, of insertion of any material into his file, of his right of access to it, and of his right to challenge the retention or accuracy of any material. When presenting a challenge, he must be allowed to have counsel, to present evidence and to cross-examine witnesses.

A panel of professional persons (who may be staff members of the institution) should be responsible for screening records and hearing challenges.

A member of the nonprofessional staff should be made responsible for the security of student records. He should maintain them under lock and key and should educate the staff about the policies, rights, and procedures relevant to student records.

4. Dissemination. The staff member responsible for records should be empowered to release data, without obtaining consent, to--

- A school official who signs a statement of legitimate educational interest. Such statements must be open to inspection by the student.
- Persons wishing to use the data anonymously in research, provided the data are not so distinctive as to identify the person to whom they pertain.
- A school to which the student is transferring. In this case the student must receive written notification of the release and a copy of the data released and may challenge the accuracy of the data.

In institutions for which the state superintendent of public instruction is responsible, he or a member of his staff may obtain data without consent if it is necessary for the proper exercise of the superintendent's duties.

No information whatsoever may be released in any circumstances other than those specified above, except--

- In compliance with a judicial order or an order of an administrative agency with power of subpoena. In such cases the student must be notified that such an order has been received and complied with. Mandates of government agencies should conform to the procedures outlined herein. When such a mandate does not so conform, the institution should make a written protest to the agency involved and seek legislative redress. No information may be released to Selective Service except at the request of the student.[1]
- With written consent of the student, specifying what record to release and to whom. A copy of the data to be released must be given to the student on request. Blanket consent may not be sought for release of data during a given period of time, and routine, non-specific permission to release information must affect only the permanent records (see above, IC1). Parents may have access to records without the student's consent until the student enters high school.[2]
- At the request of the student.

5. Treatment of unrecorded information. Information about a student's views, beliefs, and political associations acquired by staff members in the course of their work as teachers, counselors, or advisors is privileged information and should be protected both by law and by the ethical code of

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[1]"The responsibility for keeping a selective service board informed regarding the current student status of a registrant is upon the registrant himself and not upon the college." Letter from Daniel O. Omer, deputy director of selective service, to the ACLU, December 2, 1968, quoted in American Civil Liberties Union, Academic Freedom and Civil Liberties of Students in Colleges and Universities 22 (1970).

[2]The decision in Van Allen v. McCleary, 211 N.Y.S. 2d, Sup. Ct. (1961) holds that although school officials may insist on supplying the parent with "interpretations" of his child's records instead of the record itself, parents are entitled to inspect their own children's records directly.

their profession. Opinions of staff members concerning a student's intellectual or skills ability or traits of character should be communicated only on request of the student or to other staff members seeking the information for legitimate educational purposes consistent with the Code of Ethics of the Education Profession.

I. STUDENT AFFAIRS

A. The Right to Freedom of Association

1. Conditions for organization registration. Students have the right to form and maintain organized groups. Such groups may wish to register with the institution in order to obtain the right to use institutional funds, where these are available. Registration of an organization does not imply institutional endorsement of its aims or activities. The institution must register any group organized for a purpose not prohibited by law[1] if it submits a list of members designated as contacts, its constitution and bylaws, and the constitution and bylaws of any off-campus organization with which it is affiliated. If an organization does not have a written constitution, it may submit a written statement of its purposes. Any changes in a constitution or bylaws should be reported within a specified period after they are made or received.

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[1]In NAACP v. Button, 371 U.S. 415, 444-45 the Supreme Court pointed out that "The Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." Furthermore, NAACP v. Alabama, 367 U.S. 449, 460-61 (1958), "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." Specifically with regard to institutional recognition of student organizations, the court in Healy v. James, 311 F. Supp. 1275 (D. Conn. 1970) held that if any organization is "recognized," which in this case involved use of campus media for announcements and facilities for meetings, but no funding, the institution must use fair standards, fairly applied, in weighing the applications of all groups.

No institution may require a student group to submit a membership list as a condition of becoming or remaining registered,[1] nor may any institution refuse registration to an organization solely because it is affiliated with an off-campus organization.

2. Funds. Whether institutional funds for student organizations are derived from student fees or by allocation by the institution's budget committee, students must be involved in deciding the amount of such funds. Control of disbursement of the funds should be vested in a panel of representatives elected by and from the student body.

3. Scheduling and use of campus facilities. Institutional control of campus facilities must not be used as a device of censorship. A group of representatives should be selected in equal numbers by and from the faculty, student body, and administration to draw up written procedures for organizational use of institutional facilities. Such procedures should be designed only to ensure that scheduling of facilities is orderly and that there is adequate logistical preparation for the events. The procedures may include regulations concerning the timeliness of requests and proper maintenance of facilities. They may provide that preference be given to programs designed for audiences consisting primarily of members of the institutional community. They should stipulate that allocation of space be based on priority of requests and the physical and temporal needs of the organization, group, or individual. The panel developing the procedures may delegate the actual assignment function to an administrative official or to a student committee, retaining the right to hear appeals. The standards established must be applied objectively and equally.

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[1] "This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. Cf. United States v. Rumely...345 U.S. [41,] 56-58...(concurring opinion)." NAACP v. Alabama, 357 U.S. 449, 462.

4. Organizational autonomy. Student organizations should make clear to the public that their programs and activities do not necessarily reflect the views of the institution or student body as a whole.

5. Membership. A registered student organization may not restrict membership on the basis of race, sex, national origin, or other arbitrary or capricious criteria. Such an organization may establish any reasonable membership criteria if they are equally applied to all applicants.

6. Advisers. Because of the substantial degree of responsibility appropriate to postsecondary students, student organizations at this level have the right to decide whether to obtain faculty advisers. In a secondary institution that requires organizations to obtain faculty advisers, the faculty, student body, and administration must be aware that the function of the adviser is to counsel, not control. The adviser must not be held responsible for the actions of the group he counsels.

An organization's registration must not be withheld or withdrawn solely because it is unable to obtain an adviser acceptable to the organization.

B. The Right to Participate in Institutional Government

1. Selection of form of participation. Because institutions exist to serve students, clearly defined means must be provided for student participation in the formulation and implementation of the institution's policies. Student participation in institutional government takes the form of responsibilities on student-faculty or student-faculty-community committees; of a separate structure of governance; or of a combination of these. The different forms are suited to different institutions, depending on their purposes, size, and sources of support and control, and on the composition of the student body and faculty. Generally, it will be found necessary to

establish some separate student governing body to handle matters exclusively the concern of students.

2. Shared responsibilities. To the extent that joint governance is in effect, students should be voting members of standing and special committees concerned with all institutional policies, including curriculum; discipline; admissions; hiring, retention, and promotion of faculty members and administrators; and securing and allocation of institutional funds. The number and length of term of nonstudent members of such committees should be so limited as to give the student representatives effective influence.

3. Student government. To the extent that student government is separate from other governing bodies, the student body or its representatives must determine student government's responsibilities regarding matters of solely student concern. An explicit description of the general and specific responsibilities of student government in matters that affect groups other than students should be drawn up by representatives elected by and from the student body, faculty, and administration in mutually acceptable proportions. Procedures to be followed in any administrative review of these student government activities should be established in the same manner. No student government may be covertly subsidized, directly or indirectly, by any governmental agency.

All students must have the right to vote and hold office, regardless of race or other inborn characteristics; beliefs; background; disciplinary record; evaluation of ability or achievement; or payment of student fees. Students must establish and carry out all nomination and election procedures, without interference from any other segment of the school community. The student government has the responsibility to hear minority groups with special interests and to guarantee them representation in student government.

Without guaranteed representation, such minority groups will be consistently outvoted in elections, their "right to hold office" nonexistent, and their interests consequently unrepresented. Guaranteed representation is necessary as long as minority groups have special interests which require response from the institution as whole.[1]

No position taken by a student acting as a part of student government may affect his formal evaluations or any other aspect of his academic life.

C. The Right to Freedom of Inquiry and Expression[2]

1. Scope and limitations of permissible inquiry and expression. Students and student organizations must be free to examine and discuss all

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[1] An Indiana district court, relying on Supreme Court opinions in Fortson v. Dorsey, 379 U.S. 433, 439 (1965) and Burns v. Richardson, 384 U.S. 73 (1966), has recognized the need to protect the interests of groups that constitute a minority within a legislative district that elects several members at large. In Fortson, the court held that invidious discrimination occurs if an "apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Chavis v. Whitcomb, 305 F.Supp. 1364, 1370 (1966). Applying this standard, which had not been met in the previous cases, the Indiana court found redistricting necessary.

[2] The judicial system is vigorous in protecting First Amendment rights--"freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." "The point which defendants have forgotten, as persons in authority are wont to forget, is that the First and Fourteenth Amendments are limitations on governmental power. They were intended to have and do have the force of law. If Acts of Congress, state statutes, or administrative actions conflict with these limitations, they must yield; the Constitution is the supreme law of the land." Brooks v. Auburn, 296 F.Supp. 188, 197 (M.D. Ala. 1969), aff'd 412 F.2d 1171 (5th cir. 1969). Courts have been extremely wary in accepting reasons given for abridging these rights. In the case of Dennis v. United States, 341 U.S. 494, 510 (1951), the Supreme Court quoted the opinion of Judge Learned Hand in the same case, 183 F.2d 201, 212: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." A more specific formulation of standards followed in United States v. O'Brien, 391 U.S. 367, 377 (1968): "[A] governmental regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an

questions of interest to them; to express opinions publicly and privately, both verbally and by such visual means as buttons or insignia or other

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important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Such strict protection is necessary to the maintenance of a free society. "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." De Jonge v. Oregon, 299 U.S. 353, 365 (1937). Often referred to in this connection is the decision in Terminiello v. Chicago, 337 U.S. 1, 4: "The vitality of civil and political institutions in our society depends on free discussion....The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

"Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and presumptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, although not absolute [Chaplinsky v. New Hampshire, ... 315 U.S. [568] 571-72 [parallel citations omitted]], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. [Citations omitted]. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." These decisions follow the reasoning set out in the case of Stromberg v. California, 283 U.S. 359, 369 (1931): "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

The Court in West Virginia v. Barnette, 319 U.S. 624, 641 (1943) gave a vivid picture of the alternative: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."

One specific application of these principles to the rights of students occurs in the case of Tinker v. Des Moines Independent Com. Sch. Dist., 393 U.S. 503, 506: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." The court continues, at 508-509: "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from

absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v. Chicago, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society....In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by **something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."** At 511: **"In our sytem, state-**operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the state chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." And at 512: "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."

The Court in fact specifies (at 512): "The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school, it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars ... 363 F.2d [744,] 749. But conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (C.A. 5th Cir. 1966)." The court in Blackwell had found that the students involved had indeed created substantial disruption; in the Burnside decision, which it rendered the same day, it had noted explicitly that "school officials cannot ignore expressions of feeling with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression" with the exception quoted in Tinker and illustrated in Blackwell.

forms of symbolic speech;[1] to circulate and present petitions; to assemble; and to support causes. This right must not be abridged unless the activity involved causes legally recognizable injury to persons or property or demonstrably prevents the learning process from continuing.

The plaintiffs in Blackwell were themselves found to have created a disturbance; with regard to disturbances created by others, the decision in Richards v. Thurston, 304 F. Supp. 449, 454 (1969) (second supporting opinion) (Wyzanski, J.), quotes Beatly v. Gillbanks, 9 Q.B.D. 308, 314 (1882): "A man may not be restrained 'from doing a lawful act merely because he knows that his doing it may cause another to do an unlawful act.'" Judge Wyzanski continues, "As Professor Zecheriah Chafee, Jr. observed in Free Speech in the United States (1941) pp. 151-152, 160-161, it is absurd to punish a person 'because his neighbors have no self-control and cannot refrain from violence.'"

The intention of disrupting is insufficient cause to infringe on freedom of expression. "That plaintiffs may have intended their criticism to substantially disrupt or materially interfere with the enforcement of school policies is of no significance per se under the Tinker test." Scoville v. Board of Education of Joliet Township, 425 F. 2d 10, 14.

In short, First Amendment rights are as fully protected within the educational system as outside of it, subject only to the limitations enunciated in Tinker. The court in Dickey v. Alabama State Board of Education, 273 F. Supp. 613, 618 (1967) articulated the principle on the postsecondary level: "A state cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a state-supported institution." The relation between the two levels is expressed in the Scoville opinion: "The fact that /Dickey/ involved a university is of no importance, since the relevant principles and rules apply generally to both high schools and universities."

1"Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind....A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632. As communication, symbols, no matter how controversial, are protected by the First Amendment to the same extent as speech or writing.

Any rule made regarding any aspect of freedom of speech, petition, association, or assembly must be stated with clarity and precision.[1]

2. Speakers and programs. Students and student organizations must be free to invite and hear any person of their choosing.[2] Demon-

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[1]"Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." Ashton v. Kentucky, 384 U.S. 195, 200 (1966). A standard is offered in Soglin v. Kauffman, 295 F.Supp. 978, 993 (1968): "[W]hen the end can be more narrowly achieved, it is not permissible to sweep within the scope of a prohibition activities that are constitutionally protected free speech and assembly." It is to protect constitutionally allowable activities that courts strike down laws or regulations that are vague or overbroad: "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. 4.5, 432-33 (1963). In the case of Dombrowski v. Pfister, 380 U.S. 479, 494, the Court described the "chilling effect" of overbroad laws: "This overly broad statute also creates a "danger zone" within which protected expression may be inhibited. [citations omitted.] So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."

In studying a possibly overbroad rule, courts may consider any possible case in which the rule would prohibit protected behavior. "[P]ossible applications of the [rule] in other factual contexts besides that at bar' may be taken into account in appraising the rule's inhibitory effect upon First Amendment freedoms. NAACP v. Button, 371 U.S. 415, 432 [parallel citations omitted]." Soglin v. Kauffman, 295 F. Supp. 978, 993 (1968).

[2]"A perusal of [recent First Amendment college] cases makes clear a recurring theme that once a public school makes an activity available to its students, faculty, or even the general public, it must operate the activity in accord with first amendment principles. Thus, while it might be constitutional for a state university to deny use of its facilities to all outside speakers, it is clearly unconstitutional to allow some outside speakers to use facilities but to deny their use to speakers who are controversial or considered undesirable by the college administration, board of trustees, or state legislature. '[A]s it opens the lecture halls it must do so nondiscriminatorily.' Stacy v. Williams, 306 F. Supp. 963, 971 (N.D. Miss. 1969). See Brooks v. Auburn University, 412 F. 2d. 1171 (5th Cir. 1969), aff'g 296 F. Supp. 188 (M.D. Ala. 1969); Smith v. University of Tennessee, 300 F. Supp. 777 (E.D. Tenn. 1969); Snyder v. Board of Trustees of University of Illinois, 286 F. Supp. 927 (N.D. Ill. 1968); Dickson v. Sitterson, 280 F. Supp. 486 (M.D. N.Y. 1968)." ACLU of Virginia v. Radford College, C.A. 70-C-25-R 4 (W.D. Va. 1970).

Furthermore, refusal to allow certain persons to speak because of their opinions rather than the application of any reasonable rule regarding time, place,

strations threatened in the event of a particular program must not be regarded as grounds for withholding permission for the program.[1] They are expressions of opinion, subject to the specified limitations on such expression. No institution may require a student group to hear both sides of any issue, for

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or circumstances is likely to be an exercise of unconstitutional prior restraint of expression. "The speech may not be restrained in advance except when there is clear and unmistakable determination that the speaker will violate the law in the course of his speech." Brooks v. Auburn, 296 F. Supp. 188, 197 (1969). This is a stringent restriction; regarding the distinction between incitement and advocacy, for example, "the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such an action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

The importance of such rights at all levels is stated in Brooks v. Auburn, supra, 296 F. Supp. at 192: "[I]n terms of freedom of expression what is true of elementary and secondary education must be true a fortiori of colleges and universities. Indeed, it could be argued that an open forum is even more important on a campus than among the public generally."

Freedom of speech without freedom to hear is meaningless: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." Lamont v. Postmaster General, 381 U.S. 301, 308 (1965). The court in Brooks also stressed the reciprocal nature of free communication (296 F. Supp. at 194): "[R]egulations may not be used to deny either the speakers or the listeners equal protection of the laws by discriminating among speakers according to the orthodoxy or popularity of their political or social views. See Niemotko v. Maryland, 340 U.S. 268 ... (1951); Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963)."

[1] The decision in Gregory v. Chicago, 394 U.S. 111 (1969) holds that anticipated unruly conduct of bystanders is no justification for the arrest of peaceful civil rights demonstrators. The opinions in Terminiello v. Chicago, 337 U.S. 1, 4; and Richards v. Thurston, 304 F. Supp. 449, 454, quoted above, also support this principle. It is also expressed in Griffin v. Tatum, 300 F. Supp. 60, 63 (1969): "[T]he exercise of a constitutional right cannot be curtailed because of an undifferentiated fear that the exercise of that right will produce a violent reaction on the part of those who would deprive one of the exercise of that constitutional right. As was stated in United States v. U.S. Klans, 194 F. Supp. 897, 906 (M.D. Ala. 1961): 'This court recognizes that the threat of mob violence is no excuse for the failure of the Court to issue an injunction to protect the constitutional rights of private citizens. Cooper v. Aaron, 1958, 358 U.S. 1.'"

There is to a certain extent the right to take a risk, as was pointed out by the decision in Westley v. Rossi, 305 F. Supp. 706, 712 (1969): "Defendants express a concern for plaintiff's personal safety. Plaintiff's own personal safety would seem under the circumstances to be a matter of his choice. There is no evidence or showing nor of course can there be that plaintiff will receive any violence."

this is a right, not a duty.[1]

3. Location of active expressions or dissemination. Freedom of expression must not be restricted to areas especially designated for meetings, indoors or out. An effective opportunity to reach others whose interest a student may desire to attract may appropriately extend to other facilities on campus. There must be no special restriction on distribution of printed matter or the exercise of other forms of expression in places of general public access, including school buildings and grounds, and including display of materials on bulletin boards.[2]

4. Financially independent student publications. To protect the institution and ensure editorial independence, it is desirable that student publications be as financially independent as possible and that student publications be incorporated. Financially independent student publications must be free of all external regulation or intervention.

5. Financially dependent student publications. The institution must refrain from using its financial power as a means of controlling publications

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[1]This point is touched on in the opinion in Brooks v. Auburn, 296 F. Supp. 188, 198: "Conflicting points of view on sensitive current topics must be--where people want to hear them--afforded a forum. The denial of the right to hear these conflicting views--even though those in authority believe them to be unwise or un-American violates the very ideas of our government."

[2]"Clearly then, freedom of speech, which includes publication and distribution of newspapers, may be exercised to its fullest potential on school premises so long as it does not unreasonably interfere with normal school activities. Administration can properly regulate the times and places within the school building at which papers may be distributed. ... A proper regulation as to 'place' might reasonably prohibit all discussion in the school library. Administration may not, however, apply regulations as to 'time' or 'place' or 'manner' in a discriminatory fashion. ...

"It is also clear that if a student complies with reasonable rules as to times and places for distribution within the school, and does so in an orderly, non-disruptive manner, then he should not suffer if other students, who are lacking in self-control, tend to over-react thereby becoming a disruptive influence. (Vide Terminiello v. Chicago, 337 U.S. 1, 4 (1949)." Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1340 (S.D. Tex. 1969).

that cannot operate without institutional aid.[1] Guidelines for any such publication--including policies concerning publication of libelous or obscene material--should be established by a panel selected in equal numbers by and from the student body on the one hand and the faculty and administration on the other. In no case may content of the publication be censored by this panel or any other agent.[2] The student staff of the publication is responsible for

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[1]"The state is not necessarily the unrestrained master of what it creates and fosters. Thus in cases concerning school-supported publications or the use of school facilities, the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process." Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass 1970).

[2]Arbitrary action, uncontrolled by specific and explicit standards, is as clearly unconstitutional in this connection as in any other form of protected activity: "The arbitrary acts of a censor cannot be tolerated; not because arbitrary power will be abused in every case but because of its inherent potential for discrimination against unorthodox views." Brooks v. Auburn, 296 F. Supp. 188, 197. A situation in which decisions are necessarily arbitrary was described in the decision in Antonelli v. Hammond, 308 F. Supp. 1329, 1333: "No guidelines of acceptability were established and no standards limit the discretion of the two faculty members as they pass judgment on the material submitted to them. No procedure was designed whereby the reasonableness or validity of a board decision might be tested or reviewed." The same decision continues (at 1335), "No matter how narrow the function of the [faculty] advisory board, it constitutes a direct previous restraint of expression and as such there is a 'heavy presumption against its constitutional validity.' Bantam Books, Inc. v. Sullivan, 1963, 372 U.S. 58, 70 [parallel citations omitted] and cases there cited."

Furthermore, freedom of the student press has positive benefits to the school and to society: "This court holds that the First Amendment serves as a 'safety valve' and tends to decrease the resort to violence by frustrated citizens. The remedy for today's alienation and disorder among the young is not less but more free expression of ideas. ... Student newspapers are valuable educational tools, and also serve to aid school administrators by providing them with an insight into student thinking and student problems. They are valuable channels of student protest which should be encouraged, not suppressed." Eisner v. Stamford (D. Conn. 1970) 39 LW. 2037. Civ. No. 13220. The decision in Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D. N.Y. 1969) points out: "This lawsuit arises at a time when many in the educational community oppose the tactics of the young in securing a political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication, may be precluded from doing so by that same adult community." Another decision held that "Because of the potentially great social value of a free student voice in an age of student awareness and unrest, it would be inconsistent with basic First Amendment freedoms to permit a campus newspaper to be simply a vehicle for ideas the state or the college administration deems appropriate." Antonelli v. Hammond, 308 F. Supp. 1329, 1337.

following the established guidelines, and should consider itself legally responsible for consequences of failure to do so. When they are in doubt as to whether a statement is libelous or obscene, they should seek the opinion of an impartial legal authority in order to protect themselves. Publications financially assisted by the institution must make space available for expression of viewpoints opposed to those expressed by the publication's staff.[1]

The staff of financially dependent student publications must be protected from removal or reprisal caused by faculty, administration, or public disapproval of editorial policy or content. It should also be protected from removal or reprisal caused by a small vocal minority of students. All staff members of such publications should be selected by students, and no external agency may have power to appoint or remove such personnel. If the publication's policy-making panel charges a staff member with deliberate malice or deliberate distortion, the validity of the charge must be determined through due process before student action based on it is requested.

6. Other media. Like freedom must be assured expression in other student communications media and artistic presentations, such as broadcasts, tapes, films, and theatrical productions. All student media should explicitly state that the opinions expressed are not necessarily those of the institution or of the student body as a whole.

III. LAW, DISCIPLINE, AND GRIEVANCE

A. The Right To Establish Standards for Discipline and Grievances

1. Establishment of disciplinary and grievance procedures. The procedures for selection of hearing committees and hearing officers; the jurisdictions of faculty and student judicial bodies and of institutional officials including faculty members; and the regular disciplinary, grievance, and appeal

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[1] See the third note under "Speakers and Programs" above.

procedures should be clearly formulated by a committee elected in equal numbers by and from the student body and faculty. This committee should also specify the method of enforcement of regulations, whether through an honor code or by other means. Jurisdictions and procedures must be communicated to all students, faculty members, governing board members, and the community when formulated and to all entering students and new faculty thenceforward. A committee composed in the same way should be constituted at regular intervals to revise the jurisdictions and procedures and promulgate the revisions. In no case may revisions be retroactive.

Procedures may vary in formality with the gravity of the offense or of the sanction to which an accused person is liable.[1] In no case may the student's rights of due process be abridged or denied, and in no case may the same person act as both judge and prosecutor.

2. Establishment of standards of conduct. Representatives elected by and from the student body should draw up a code of the standards they consider essential to the continuity and integrity of the learning process and to the community life of the institution.[2] This panel must recognize that the personal life of the student is of no concern to the institution as long as his behavior does

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[1]Courts have great respect for the penalties to which students may be liable. "I take notice that in the present day, expulsion from an institution of higher learning, or suspension for a period of time substantial enough to prevent one from obtaining academic credit for a particular term, may well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding." Soglin v. Kauffman, 295 F. Supp. 978, 988. Referring to the same sanctions, the decision in Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1344, extended the Soglin conclusion to high school students: "If the punishment could be this severe, there is no question but that a high school student as well as a university student might well suffer more injury than one convicted of a criminal offense."

Students subject to these penalties should therefore be afforded as great a degree of protection as is afforded in a court of law. A suitable hearing procedure is outlined in III B 5 below.

[2]Off-campus activity per se is irrelevant: "[I]t makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with

not interfere with the rights of others.[1]

The standards established must secure to students the exercise of the rights enjoyed by other citizens, including the freedom of speech and peaceful

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his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations to others during his private life away from the campus." Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1340-41 (1969). In regulating conduct, the student committee is here in the same position as the administration or officials in Sullivan and therefore subject to the same restriction.

[1]Regarding regulation of physical appearance, for example, "As the court stated in Union Pacific Railway Co. v. Botsford, 141 U.S. 250, 251 [parallel citations omitted] (1891): 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" Richards v. Thurston, 424 F. 2d 1281 (1970) aff'g. 304 F. Supp. 449. The Seventh Circuit, in the case of Crews v. Cloncs, No. 1 110, 6 (April 1970), pointed out that "the Supreme Court has recognized that the special right of an individual to control his physical person weighs heavily against arbitrary state intrusions. Breithaupt v. Abram, 352 U.S. 432, (1957); Rochin v. California, 342 U.S. 165, 172 (1952). Indeed, unless the fundamental nature of the liberty claimed by Plaintiff [to regulate his appearance] is recognized, the freedom guaranteed by the Bill of Rights could be significantly diluted through subtle forms of state repression and tyranny." "In short, the freedom here protected is the right to some breathing space for the individual into which the government may not intrude without carrying a substantial burden of justification." Griffin v. Tatum, 300 F. Supp. 60, 62 (M.D. Ala. 1969). Regulations of physical appearance may not only infringe on protected rights, but discriminate invidiously: "[T]he equal protection clause of the fourteenth amendment prohibits classification upon an unreasonable basis. This court is of the firm opinion that the classification of male students attending Jefferson State Junior College by their hair style is unreasonable and fails to pass constitutional muster." Zachry v. Brown, 299 F. Supp. 1360, 1362 (N.D. Ala. 1967).

A standard for the reasonable regulation of students' appearance was stated by the New York State Commissioner of Education in discussing dress: school authorities may "prohibit the wearing of any kind of clothing which causes a disturbance in the classroom, endangers the student wearing the same, or other students, or is so distractive as to interfere with the learning and teaching process." Dalrymple v. Board of Education of the City of Saratoga Springs (No. 7594).

Another aspect of a student's personal life was dealt with by the court in Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (1969), when it ruled (at 753) that "plaintiffs may not be excluded from the schools of the district for the sole reason that they are unwed mothers." The court gave several reasons for its decision. Such exclusion "is arbitrary in that the individual is forever barred from seeking a high school education. Without a high school education, the individual is ill equipped for life, and is prevented from seeking higher education." (Ibid. at 753) On the other hand, (at 752) "the opportunity to pursue their education gives them a hope for the future so that they are less likely to fall into the snare of repeated illegitimate births."

assembly and the right to petition guaranteed by the Constitution.[1] No standards may forbid or inhibit such activities as work for political parties; participation in campaigns, picketing, and public demonstrations; or circulation of leaflets or petitions.

The court pointed out (Ibid.) that "any rule which fastens on one wrong, and never permits a person to change his position or condition is indeed on tenuous grounds."

[1]The student body is not empowered to infringe its own rights. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943). "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." Lucas v. Forty - Fourth Gen. Assem. of Colo., 377 U.S. 713, 736-37 (1964).

Bates v. Little Rock, 361 U.S. 516, 524, states a criterion of constitutionality: "[W]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." A rule must also be relevant: "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." Pierce v. Society of Sisters, 268 U.S. 510, 535. Protected rights need not be explicitly listed in the Constitution: "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling v. Sharpe, 347 U.S. 497, 499-500.

These principles are applicable to the liberty of the student as well as of other citizens. "Merely arbitrary choices of states or their official representatives cannot be enforced against any individual's serious claims of liberty. This is as true of minors as it is of adults. [Citations omitted.] And when the personal liberty claimed by a minor or an adult has a high order of importance the state must make a strong showing of the need of its curtailment. United States v. O'Brien, 391 U.S. 367, 377." Richards v. Thurston, 304 F. Supp. 449, 452. This requirement applies to school authorities: The decision in Westley v. Rossi, 305 F. Supp. 706, held that actions of a school board are state actions within the meaning of the provision of the Civil Rights Act that prohibits persons under color of state law to subject a person to deprivation of rights, privileges or immunities secured by the Federal Constitution and laws. Specifically, (at 714), "Regulation of conduct by school authorities must bear a reasonable basis to the ordinary conduct of the school curriculum or to carrying out the responsibility of the school." The state interest served by the school, to which rules must be relevant, was articulated in the Scoville decision: "[W]hile recognizing the need of effective discipline in operating schools, the law requires that the school rules be related to the state interest in the production

Standards may properly forbid injury to persons or institutional property or prevention of continued learning activity, but they may not otherwise duplicate the prohibitions of law.[1] The law enforcement, judicial, and dispositional work of legal authority must be presumed to be such as to protect society and correct the lawbreaker without additional action on the part of the educational institution. Standards must not penalize students for being accused or convicted of a violation of law. They may enjoin students to perform certain obligations which trial or incarceration render impossible to fulfill but they may not invoke any penalty other than that incurred by other students who fail to carry out these obligations.[2]

Definitions of offenses must describe the prohibited acts as clearly and explicitly as possible.[3] Like the code of jurisdictions and procedures

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of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled or chilled." Scoville v. Board of Education of Joliet Township, 425 F. 2d 10, 14.

The standard of reasonableness was applied by the court in Dickey v. Alabama State Board of Education, 273 F. Supp. 613, 617, 618. "Boards of education, presidents of colleges, and faculty advisers are not excepted from the rule that protects students against unreasonable rules and regulations. ...the school and school officials have always been bound by the requirement that the rules and regulations must be reasonable [italics given]."

[1]Such duplication is not presently considered double jeopardy by the courts; however, a recent decision in the case of Waller v. Florida, 90 S.CT. 1184, held that because both state and municipal courts in Florida derive their power from the state, to try a person in both courts for the same act would be to put him in double jeopardy and hence be constitutionally impermissible. It is possible that the state educational system also would be found to be a part of the same sovereign entity.

[2]A rule must not be made the excuse for punishing behavior because it is repugnant to the authorities: "To be sure, discipline for truancy or for any other wrongdoing cannot be made an instrument of racial discrimination or imposed for asserting a constitutional right or privilege." Woods v. Wright, 334 F.2d 369, 375 (1964).

[3]Vague or overbroad rules are vulnerable particularly in the area of First Amendment rights, but not only in that area. "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary methods of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of normal intelligence must necessarily guess at its meaning and differ as to its applica-

(see III A 1), the body of standards must be made known to all students, faculty members, governing board members, and the community when formulated

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tion, violates the first essential of due process of law." Connally v. General Construction Co., 269 U.S. 385, 391 (1929). This standard is not applicable to criminal laws alone: "The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." Small Company v. American Sugar Refining Co., 267 U.S. 233, 239 (1925).

Furthermore, "[i]t will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful ... prosecution for some of the activities. ... Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." Baggett v. Bullitt, 377 U.S. 360, 373 (1964). That is, one of the evils of a vague regulation is that it invites arbitrary enforcement. "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886). The same opinion continues, at 373-74, "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U.S. 259; Chy Luny v. Freeman, 92 U.S. 275; Ex parte Virginia, 100 U.S. 339; Neal v. Delaware, 103 U.S. 370; and Soon Hing v. Crowley, 113 U.S. 703...."

In view of the severity of sanctions available to school judicial bodies, whether student or administrative, and of the weaknesses of vague laws, school regulations also must be precise. "School rules probably do not need to be as narrow as criminal statutes but if school officials contemplate severe punishment they must do so on the basis of a rule which is drawn so as to reasonably inform the student what specific conduct is prescribed." Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1344 (1969). The same court pointed out that "[t]he high school too is changing and generalities can no longer serve as standards of behavior when the right to obtain an education hangs in the balance."

The decision in Soglin v. Kauffman, 295 F. Supp. 978, examined two university regulations for sufficient precision; at 991, the court declared "that a standard of 'misconduct,' without more, may not serve as the sole foundation for the imposition of the sanction of expulsion, or the sanction of suspension for any significant time, throughout the entire range of student life in the university." Regarding a policy that student protesters may use "lawful means which do not disrupt the operations of the university" the court observed (at 993): "Neither the element of intention, nor that of proximity of cause and effect, nor that of substantiality, for example is dealt with by its language. Nor does it contain even the most general description of the kinds of conduct which might be considered disruptive of the operations of the university, nor does it undertake to draw any distinctions whatever as among the various categories of university 'operations.'"

and to all entering students and new faculty members thenceforward.[1]

Any necessary interpretation of regulations should be based on the criterion of relevancy to the educational process.

Disciplinary action must be taken only through the established procedure and only for breach of regulations established and published as stated above.[2]

The institution has an obligation to apply regulations equally to all students who are similarly situated. This does not mean, however, that an institution is required to refrain from prosecuting some alleged offenders because there are others who cannot be identified or who for some other valid reason are not presently being tried. In the absence of evidence of discriminatory enforcement, hearings may properly be held for those against whom charges

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[1] "I find and rule that any rules and regulations, the violation of which might lead to and justify expulsion, should be published and made known to all the students, especially minors, so that they would not end up being manhandled by 'rules and regulations' made up for the occasion, and tailor made to suit the individual propensities of individual faculty members." Sturm v. Trustees of Boston University, No. 89433 5.13 (Sup. Ct., Suffolk County, 1969). The same court found that "In the instant case, /the institution's/ 'rules and regulations' were an unpublished item, to the extent that they existed. Therefore, the students at /the institution/, including the plaintiff, had no reasonable standards to advert to; and whatever rules and regulations /the institution/ might have had in mind (including unwritten rules, presumably) were never published so that, to that extent, they were not known to the plaintiff as well as other students. This Court refuses to rule that the student is assumed to know all such rules and regulations because, to do so, would be, in my judgment to indulge in a fiction, at the expense of the plaintiff in this case."

[2] With regard to disciplinary actions administrative officials might take, the decision in Soglin v. Kauffman, 418 F.2d 163, 168, observed, "Pursuant to appropriate rule or regulation, the University has the power to maintain order by suspension or expulsion of disruptive students. Requiring that such sanctions be administered in accord with preexisting rules does not place an unwarranted burden upon university administrations." The decision points out at 167, "The proposition that government officers, including school administrators, must act in accord with rules in meting out discipline is so fundamental that its validity tends to be assumed by courts engaged in assessing the propriety of specific regulations." This is not surprising, for "/i/n the non-university society, in the absence of a reasonably clear rule or standard or criterion promulgated by those duly empowered to promulgate them, one may not be punished for violating the order of an administrator, such as a policeman." Soglin v. Kauffman, 295 F. Supp. 978, 984.

have been brought even when there are other alleged offenders against whom charges have not been brought.[1]

B. The Right to Just Enforcement of Standards

1. Investigation of student conduct. Students have the same rights of privacy as any other citizens and surrender none of those rights by becoming members of the educational community. No institution may use any medium of communication to monitor discussion without the permission of the participants, or to photograph students inside or outside of regular learning activities without their permission. No institution may maintain agents to secure information about student activities or deputize staff members to report on or search students. Such practices prevent students from exercising without fear such rights as freedom of speech, of inquiry, and of association. They create distrust among students and between students and staff members. They cannot therefore be condoned in an educational institution or in a free society.

The rights of privacy extend to residence hall living.[2] Nothing in the institutional relationship or residence hall contract may expressly or

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[1]Adapted from the Report of the American Bar Association Commission on Campus Government and Student Dissent.

[2]The decision in Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725, 729 (M.D. Ala. 1968) sets out the basic principle: "A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a 'waiver' of that right as a condition precedent to admission." Freedom from unreasonable search and seizure is guaranteed by the Fourth Amendment, and a state or its institutions may not compel waiver of that right as a condition of receiving a public benefit like education. Some standards of reasonable search are given in Piazzola v. Watkins, Civil Action No. 3071-N 7(N.D. Ala): "Since there was no warrant, no probable cause for searching without a warrant, and no waiver or consent, the search of petitioners' dormitory rooms by State law enforcement officers, including narcotic officers and...city police officers...was in violation of the petitioners' rights as guaranteed by the Fourth Amendment to the Constitution of the United States." Most important, "[t]he fact that the University officials agreed to the search gives it no validity." (Ibid. at 6)

The decision in Katz v. United States, 389 U.S. 347, 356 (1967), gives more detail: "In the absence of...safeguards [of judicial consent and supervision], this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' Agnello v. United States, 269 U.S.

impliedly give the institution or residence hall officials authority to consent to a search of a student's room or property by police or other government officials. Premises occupied by students, and the desks, lockers, or personal possessions of students must not be searched unless the ordinary requirements for lawful search have been complied with. If necessary to prevent injury to

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20, 33 ... for the Constitution requires 'that the deliberate, impartial judgment of a judicial observer *** be interposed between the citizen and the police ***.' Wong Sun v. United States, 371 U.S. 471, 481-482 .... 'Over and again this Court has emphasized that the mandate of the /Fourth/ Amendment requires adherence to judicial processes,' United States v. Jeffers, 342 U.S. 48, 51 ... and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." The exceptions are searches "incident to an arrest," in the course of "hot pursuit," and with the subject's consent. In short, "/w/hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." Johnson v. United States, 333 U.S. 10, 14 (1948).

"The basic purpose of this /Fourth/ Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.' Wolf v. Colorado, 338 U.S. 25, 27." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). The decision in Katz v. United States, supra, 389 U.S. at 351-52, states specifically that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210 ...; United States vs. Lee, 274 U.S. 559, 563.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitut ionally protected. See Rios v. United States, 364 U.S. 253 ...; Ex parte Jackson, 96 U.S. 727, 733." The decision goes on to observe (at 359): "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." The case of United States v. Blok, 188 F. 2d 1019, 1021 (D.C. Cir. 1951), concerned search of a government employee's desk: "We think appellee's exclusive right to use the desk assigned to her made the search of it unreasonable." In this case, "the search that was made was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed."

The rights of another person to consent to search of one's belongings is thoroughly explored in the case of Stoner v. California, 376 U.S. 483, 489 (1964), among others. Stoner concerns consent given police by a night clerk to search a hotel guest's room. "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." With regard to similar cases, the Court refers to Lustig v. United States, 338 U.S. 74; United States v. Jeffers, 342 U.S. 48; Chapman v. United States, 365 U.S. 610; and McDonald v. United States. 335 U.S. 451.

persons, exception may be made on institutional property after showing of probable cause and particular description of the things to be seized. Probable cause exists where the institution has substantial proof that a serious offense has been or is being committed. In every case, whenever it is possible the student's consent must be obtained and he must be present.

2. Public law enforcement officers in the institution. Law enforcement officers may be summoned to the institution for the purpose of restoring or maintaining order only when their presence is demonstrably necessary to prevent injury to persons. They may be summoned only with the consent of a standing committee elected by and from the faculty and student body in equal numbers and including an administrator. The committee should not be too large to assemble rapidly. It may consider requests from students, faculty, or administrators, but may not grant any request from any party outside the school.

Any law enforcement officer liable to be dispatched to an educational institution must meet high standards of professionalism, maturity, and ability to conduct human relations.

3. Informal disposition. Any administration of discipline by the teacher within the learning situation must be demonstrably necessary to maintain the continuity of learning. No disciplinary action may injure the human dignity of the student, by humiliation or any other means. Discipline should be designed not only to maintain the learning process of the group, but to weaken the factors that motivate the behavior in question. Procedures and regulations for the administration of such discipline must be established by the body described in IIIA1.

In cases in which discipline is not administered within the learning situation, the body designated to receive complaints may make a preliminary investigation to determine whether a charge can be disposed of informally by mutual consent of the complainant and the accused. The preliminary investigation may concern the fact of guilt or innocence of the accused person, the disposition of

a case in which the facts are undisputed, or both.

4. Status of student pending final action. Pending final action on any charges against him the status of a student must not be altered, nor his rights to continue learning activities suspended, except when his continued presence on campus poses clear and present danger to his physical or emotional safety; to the safety of student, faculty, or institutional property; or to the continuation of the learning process. Any such interim action must be subsequent to a preliminary hearing as to its necessity unless it is demonstrably impossible or unreasonably difficult to accord such a hearing. In this case the student must within 24 hours be given a written statement explaining why a hearing was not accorded, and a hearing must be held as soon as practicably possible.[1]

5. Procedures for hearings.[2] The following procedures will provide

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[1]"Unless the element of danger to persons or property is present, suspension should not occur without specification of charges, notice of hearing, and hearing.... An interim suspension may not be imposed without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it prior to an interim suspension. Moreover, even when it is impossible or unreasonably difficult to accord the student a preliminary hearing prior to an interim suspension, procedural due process requires that he be provided such a preliminary hearing at the earliest practical time." Stricklin v. Board of Regents of University of Wisconsin, 297 F. Supp. 416, 420 (W.D. Wisc. 1969), appeal dismissed, 420 F.2d 1257 (7th Cir. 1970)

[2]The court in Dixon v. Alabama State Board of Education, 294 F.2d 150, 155 (1961) held that "[w]henever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." This applies to students, because (at 156) "the state cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process." Fair rules are not enough (at 157): "The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case." The court then sets out minimum standards of due process (at 158): "The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case." If the case involves misconduct rather than academic failure (at 159), "the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant

fair treatment and incorporate the elements of procedural due process in situations involving severe sanctions, that is, suspension for more than

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case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the College [since this was the tribunal involved in the case], his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection."

The court in French v. Bashful, 303 F. Supp. 1333, 1337 (1969) observed that "[a]lthough the right to counsel was not among the rights specifically enumerated by the court in Dixon, it cannot be denied that the assistance of an attorney in a trial-type proceeding is of considerable value." The importance of education today makes suspension or expulsion comparable to criminal penalties (at 1337): "Although this is not a criminal proceeding so as to require counsel under the Sixth Amendment, nevertheless, the right to an education has become so vital in our present-day society that the procedure whereby one may lose this right should be heavily stocked with procedural safeguards." The court holds (at 1338), "When the right to retained counsel is involved, we feel that any burden which such a right places on the university is inconsequential compared to the vital interest of the student in being represented by counsel."

The decision in Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 761 (1968) held that the initial hearing should not be a dead end: "[W]e recommend that each disciplinary procedure incorporate some system of appeal."

The Supreme Court handed down an opinion concerning procedural due process in administrative proceedings in the case of Goldberg v. Kelly, 397 U.S. 254 (1970), which involved termination of welfare benefits. The Court listed several necessary elements of due process in such a proceeding (90 S.Ct. 1011, 1020): "'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U.S. 385, 394...(1914). The hearing must be 'at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552...(1965). In the present context these principles require that a [defendant] have timely and adequate notice detailing the reasons for [the action proposed], and an effective opportunity to defend by confronting witnesses and by presenting his own arguments and evidence orally." The decision continues (at 1021), "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." And at 1022, "'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' Powell v. Alabama, 287 U.S. 45, 68-69...(1932)....[T]he [defendant] must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the [defendant]. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing....Finally, the decision maker's conclusion...must rest solely on the legal rules and evidence adduced at the hearing. Ohio Bell Tel. Co. v. PUC, 301 U.S. 292...(1937); United States & ICC v. Abilene & S. Ry. Co., 265 U.S. 274, 288-289...(1924). To demonstrate compliance with this elementary

one day or expulsion.[1]

a. A person who allegedly fails to meet the established standards of conduct must be notified in writing of the regulations he is accused of infringing and of his rights of due process. If he does not choose to dispute the facts presented, the regulation cited, or that the facts constitute a violation of the regulation, he must be offered the opportunity to amend his behavior or make reparation rather than enter into a disciplinary proceeding.

b. The accused person entering into a disciplinary proceeding must be informed, in writing, of charges against him, with sufficient particularity and in sufficient time to assure him opportunity to prepare an adequate defense.

c. The accused person must have the right to choose whether to be assisted in his defense by a legal counsel or other adviser of his choice, from within or without the institution.

d. The accused person and any adviser he has selected must have access to all evidence against him both while preparing his defense and during the course of the hearing.

e. The accused person must be free from psychological or physical intimidation or coercion and from being required at any stage of the proceedings to give evidence that might incriminate him.

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requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. Wichita RR & Light Co. v. PUC, 260 U.S. 48, 57059...(1922)....And, of course, an impartial decision maker is essential. Cf. In re Murchison, 349 U.S. 133...(1955); Wong Yang Sung v. McGrath, 349 U.S. 33, 45-46...(1950)."

[1] "I take notice that an extended enforced absence from the university results in irreparable harm to the student," said Judge Doyle in Stricklin v. Board of Regents of University of Wisconsin, 297 F. Supp. 416, 422, which involved an indefinite suspension that had in fact lasted 13 calendar days. "Any action that effectively denies an education to a student must meet the minimum standards of due process. Madera v. Board of Education of New York, 386 F.2d 778, 784 (C.A. 2 1967). An indefinite suspension is deemed the equivalent of an expulsion. Madera v. Board of Education of City of New York, supra, at p. 784 f.n. 6." Hobson v. Bailey, 309 F. Supp. 1393, 1401 (1970).

f. The accused person must choose whether his case will be heard by a hearing panel or by a hearing officer. The panel or officer must be selected according to procedures established by the body described in IIIA1.

g. The hearing must be private unless the accused person requests a public hearing.

h. The burden of proof must rest on the party bringing the charge, and he must present his evidence in its entirety before the accused person is called on to present his defense.

i. In no case may the hearing panel or officer consider statements against the accused person unless the accused person and his adviser have been advised in advance of their content and unless they are given an opportunity to confront and question those who made them and to rebut unfavorable inferences which might otherwise be drawn.

j. The accused person must be given an opportunity to testify and to present evidence and witnesses. He must be notified that by choosing to appear in his own defense he waives his right not to incriminate himself with regard to the charges being heard, but that he retains this right with regard to any other charges.

k. All matters on which the decision may be based must be introduced into evidence at the hearing, and the decision must be based solely on such matters. All evidence must bear on the charges stated in writing to the accused person at the inception of proceedings. Improperly acquired evidence must not be admitted.

l. A verbatim record such as a tape recording must be made of the hearing, and the accused person must be provided a copy of all such records.

m. No recommendation that a penalty for an alleged infraction be imposed may be based solely on the accused person's failure to appear or to respond

to charges. In such an instance, the party bringing charges is obligated to present evidence of guilt beyond a reasonable doubt if a penalty is to be imposed.

n. The accused person must receive written notice of the decision rendered and the grounds on which it was made.

o. The decision of the hearing panel or officer must be final, subject to the accused person's right of appeal according to the appeal procedures established by the committee on procedures and jurisdictions.

p. The accused person whose appeal is rejected must be informed that he may carry a further appeal to the courts.